NO. 43954-9-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

PAUL SALVAGE, et ux,

Appellant,

v.

GEIGER PARMACY, et al.,

Respondent

RESPONDENTS' BRIEF

Theodore M. Miller, WSBA #39069
Attorney for Respondents

LAW OFFICES OF KELLEY J. SWEENEY
1191 Second Avenue, Suite 500
Seattle, WA 98101
(206) 633-1310

ORIGINAL

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Other Authorities

I. ISSUES PERTAINING TO ASSIGNMENT OF ERROR

No. 1: The trial court did not abuse its discretion in denying a two-week continuance to allow the appellant to obtain an expert witness as the appellant had over two years to obtain such a witness, he failed to articulate what the expert would say, and failed to show how that expert declaration would create an issue of material fact.

No. 2: The trial court did not ere as a matter of law in finding that the appellant did not make a prima facie case of medical malpractice against the respondent as the appellant failed to file any declaration or present any admissible and competent evidence for the summary judgment motion.

No. 3: The appellant did not present any facts to show a violation of the standard of care, and even if he did, the malpractice complained of was not so obvious that the doctrine of res ipsa loquitur would apply.

No. 4: The trial court was correct in finding that the appellant received proper notice under CR 56 as the motion was filed on July 2, 2013, a timely reply brief and supplemental declaration were filed on August 3, 2013, and the actual summary judgment hearing was not until August 17, 2013.

II. STATEMENT OF THE CASE

Overview:

On February 26, 2010, Appellant Paul Salvage (referred to hereafter as Salvage) filed a complaint against Paul Geiger and Geiger Pharmacy (collectively referred to hereafter as Geiger unless otherwise noted). Salvage alleged that on March 16, 2007, that he was in a single-car accident in Thurston County, Washington. He claimed that Geiger filled a prescription for methadone in the wrong amount (10 mg vs. 5 mg) and that by ingesting too much methadone he drove his vehicle under the influence that thereby resulted in the accident. On July 2, 2012, Geiger moved for summary judgment based on the lack of any medical providers who could provide an expert opinion regarding the necessary elements of a medical malpractice claim, specifically standard of care and causation. In response to the motion for summary judgment filed July 30, 2012, Salvage argued that no expert declaration was needed on the issue of standard of care as the malpractice was obvious in its face. Salvage requested a two week continuance in order to obtain an expert declaration to address the issue of causation. By August 17, 2012, Salvage failed to produce a declaration from any expert witness addressing the issue of standard of care and causation. Salvage also failed to produce any declaration that created a factual basis for his contention that he received a

prescription for methadone in the wrong amount. Thus, on August 17, 2012, the trial court ruled that Salvage failed to produce any evidence to make a prima facie case of medical malpractice and dismissed the case.

Facts:

On February 26, 2010, Salvage filed suit against Geiger alleging that Geiger improperly filled a prescription for methadone (5 mg vs. 10 mg) thereby causing Salvage to drive under the influence that resulted in a single-car accident in which Salvage claimed he was injured. CP at 4.

On September 28, 2010, Geiger propounded Interrogatories and Request for Production to Salvage. CP at 179.

On November 30, 2011, attorney David Gehrke, who originally filed the case, withdrew as counsel for Salvage. CP at 179. Salvage continued the case representing himself (pro se).

On January 11, 2011, having received no response to the interrogatories and request for production, the attorney for Geiger sent a letter requesting that the discovery be answered and setting a CR 26(i) conference. CP at 179 and 188. After that, Salvage sent several emails containing partial discovery answers (the answers are at CP 32-49). On February 9, 2012, Geiger sent a letter asking that Salvage provide full and complete answers to the interrogatories and request for production. CP at 190. Geiger then agreed to a series of extensions to allow Salvage to

provide responses. CP at 179-180 Salvage did not comply with the agreed upon deadlines and missed a CR 26(i) conference to discuss so a motion to compel discovery was filed on April 4, 2012. CP at 178.

On April 20, 2012, the trial court ordered that Salvage provide all discovery responses to Geiger by May 15, 2012. CP at 9-10. At the hearing, Salvage provided handwritten responses and random bills. The written answers provided are at CP 51-94.

Interrogatory No. 60 requested that Salvage identify all experts that he expects to call at trial. CP at 88. In response to Interrogatory No. 60 Salvage identified Mike Evans (to address repairs to Salvage's vehicle), Dr. Arthur Felts (Salvage's physician who referred him for x-rays on his shoulder), Dr. Scott Smith (orthopedic surgeon who examined Salvage's shoulder), Dr. Stephen Kramp (physician Salvage consulted after the accident concerning his methadone and conducted examination of Salvage's shoulder), Dr. David Coons (physician who operated on Salvage's arm in April 2009), and Terry Fitzgerald (to testify about repairs to Salvage's vehicle). CP at 48-49. In addition to those experts, Salvage also identified Dr. Stephen Kramp. CP at 48. Salvage disclosed the following (verbatim as answered):

> Dr. Stephen Kramp, Family Practice, Multi Care Medical Center
> 2545 Pt.Fosdick Dr. SW

> Gig harbor Washington 98385 phone number 253 530 8000
> Personal Physician from I believe 2004 - December 2009
> I made an appointment soon after the accident and described the medication that Geiger Pharmacy had given me. I told him at the time that I was cutting back to the original prescription he prescribed. Six months later or thereabouts we made a decision that it might be a good time to stop the methadone and go to a lesser narcotic. He worked with me on this. Three to four weeks after stopping the methadone my right shoulder was very painful. At the time I had no insurance so we ordered an MRI on my right shoulder which showed blunt force trauma. In January 2008 my wife put me on her insurance policy so we could go forward and get the shoulder repaired. I still have problems with the shoulder and fear I may have to have another surgery.

CP at 48. At no time did Salvage designate any expert to address the issue of pharmacist's malpractice. Salvage did not sign the certification page of the interrogatories as required by CRs 26(g) and 33. CP at 94.

In addition to the interrogatory regarding experts, Geiger also requested in Request for Production No. 10 the following: "Please produce copies of all documents and tangible evidence not previously produced that pertain in any of the answers you gave to the previous interrogatories." CP at 92. Salvage's only response to this Request for Production was "Possible David Gherke may have some." Id.

On July 2, 2012, Geiger filed a Motion for Summary Judgment.

CP at 11. The basis was that Salvage was claiming medical malpractice against the Geiger and in order to make a prima facie case, Salvage must show through expert testimony the standard of care violated and that the violation of that standard of care was the cause of the plaintiff's injuries. This hearing was noted for August 3, 2012. CP at 95. On July 30, 2012, Salvage filed a response to the motion for summary judgment along with a declaration. CP at 97-101 and 102-103. He argued that no expert witness was required to address the standard of care issue as the malpractice was apparent on its face. He did *not* request a continuance on that issue. CP 97, 98, 99-100, and 101. He did request an additional two weeks in order to obtain an expert to address the causation aspect of his case. CP at 97, 100-101,102-103. In his declaration, he writes, "I am confident however, that the affidavit [from his expert] will be ready within two weeks, and that is why I ask for the extension."[1] CP at 103.

On August 3, 2012, Geiger filed a reply to Salvage's response and submitted a supplemental declaration to address the issues raised by Salvage in his response. CP at 104-117 and 118-129.

At Salvage's request, the summary judgment hearing was re-noted

[1] Note that the actual hearing was held on August 17, 2012. Salvage requested a two week continuance on July 30, 2012. Thus, at the hearing, Salvage should have had this expert declaration. However, at the hearing on August 17, 2012, Salvage represented to the trial court that he would not see his supposed expert until August 30, 2012. RP at 18: 8-17.

to August 10, 2012. CP at 104-105.

On August 7, 2012, counsel for Geiger listened to a voice message from Salvage in which Salvage stated that he had "no problem" letting counsel look at the evidence and documents in this case. CP at 140. In a subsequent phone call that day, Salvage identified that he had in his possession (1) pill bottles from April 2007 and May 2007, (2) the prescription for methadone from Dr. Kramp, (3) a statement from Dr. Kramp indicating that the accident on 2007 happened because the pharmacist doubled the methadone prescription, (4) "documentation" from Geiger Pharmacy, and (5) a compact disc with all of Dr. Kramp's notes. CP at 140-141 and 150. In that call, Salvage admitted that he had all of these documents in his possession prior to May 15, 2012, but had not disclosed them. CP at 141 and 150.

On August 8, 2012, Salvage faxed one page of his medical records and a printout of prescriptions from Geiger Pharmacy. CP at 141. Then, on August 10, 2012, Salvage produced the supposed bottles containing the prescription for inspection. CP at 141. Counsel for Geiger was then briefly able to view the bottles while in court waiting for the case to be called. CP at 141.

On August 10, 2012, both parties appeared for the Motion for Summary Judgment. However, since Geiger did not confirm the hearing

with the court, the court struck the hearing. Page 4 of Docket attached to Appellant's Opening Brief. The Motion for Summary Judgment was then properly noted and confirmed for August 17, 2012, along with the Defendant's Motion to Dismiss For Failing to Comply with Discovery Order. CP at 156-157.

On August 10, 2012, Geiger filed a motion to dismiss for failing to provide discovery. CP at 130-138. This motion as well as the summary judgment motion were noted for August 17, 2012. CP at 156-157.

On August 17, 2012, the trial court considered Geiger's summary judgment motion.[2] Salvage failed to provide bench copies of his motion and declaration.[3] RP at 11: 22-25 and 12: 8-16. The trial court addressed whether Salvage would be represented by counsel at the hearing and Salvage confirmed that he did not desire to have counsel present for the summary judgment motion. The trial court asked, "Did you expect him [John Andrews] to appear for you formally?" Salvage responded, "Not

---

[2] The trail court first denied Salvage's request for a continuance on discovery motion and then addressed the summary judgment. Since summary judgment was granted, the court did not address the merits of Geiger's motion to dismiss for discovery violations.

[3] The following local rules apply:

(1) Kitsap County Local Civil Rule (KCLCR) 7(b)(1)(B) reads as follows: "Bench Copies. At the time a party files any document with the office of the Clerk of Court pursuant to section (A) above the party shall be responsible for filing bench copies simultaneously with the Superior Court office along with a notification of trial or hearing date. Bench copies are mandatory for all hearings for which pleadings have been filed."

(2) KCLCR 56(c) states: "A bench copy of the summary judgment and all supporting documents and responses shall be delivered, on the date of filing, to the Superior Court office."

today, no." RP at 4: 19-21. The court then addressed the continuance for summary judgment. After going through with Salvage his request and what documents he wished to obtain, Salvage clarified that he is seeking additional time to gather documents from his former attorney so that he could address Geiger's motion to dismiss for discovery violations. The following dialogue ensued RP at 7-8:

> JUDGE LAURIE: And so Mr. Miller is telling me that the disc that you're talking about relates to that second motion, the motion to dismiss for failure to comply with discovery sanctions.
>
> MR. SALVAGE: Correct.
>
> JUDGE LAURIE: Let's talk about the motion for summary judgments rather, then, than the discovery violation.
>
> MR. SALVAGE: Okay.
>
> JUDGE LAURIE: Do you have any—
>
> MR. SALVAGE: Evidence?
>
> JUDGE LAURIE: --any legal reason to continue that motion?
>
> MR. SALVAGE: The summary judgment is, explain one more time, Your Honor, please.
>
> JUDGE LAURIE: The defendant's position is that you've not produced any competent evidence.
>
> MR. SALVAGE: No. I have no reason to continue that.

> JUDGE LAURIE: All right. So we'll go forward with that today, but you're asking for a continuance of the discovery—
>
> MR. SALVAGE: Right, yes, Your Honor.

The trial court heard arguments from both sides regarding the merits of the summary judgment. The trial court granted summary judgment in favor of Geiger and dismissed the case. RP at 23-25: 21-16. After the trial court issued its ruling from the bench, Salvage reiterated his request for a continuance and said that his supposed attorney, John Andrews, was "supposed to be here" and that Salvage had already paid him "$2,000." RP at 25: 6-7. The trial court advised Salvage that he could ask the court to reconsider its order dismissing the case. RP at 25: 12-16. An order granting summary judgment and dismissing the case was entered. CP at 167-169.[4] Salvage never filed a request for reconsideration.

Notice of appeal was filed on September 13, 2012. CP at 170.

[4] Note that the order was entered by the trial court on August 17, 2012. Paragraph 1.1 incorrectly states that the hearing was held on August 10, 2012. This was a scrivener's error. The docket also clearly shows that the hearing was held on August 17, 2012. Docket attached to Appellant's Opening Brief at p. 4.

III. ARGUMENT

A. The trial court correctly decided that summary judgment in favor of Geiger was appropriate as (1) Salvage presented no evidence to make a prima facie showing that the standard of care was violated (an issue for which he did not seek a continuance), (2) Salvage explicitly stated to the trail court that he was not seeking a continuance on the summary judgment motion, and (3) Salvage could not articulate what, if any, admissible evidence he could produce if given additional time.

Salvage first contends that the trial court incorrectly denied his request for a continuance. He argues that trial court abused its discretion in denying the oral request for a continuance. However, the record is clear that at the outset of the hearing, Salvage clearly and unequivocally stated that he did not request a continuance as it pertained to the summary judgment motion. In addition, in his response to the motion for summary judgment he explicitly states that he was not seeking a continuance on the issue of standard of care and he even reiterated that position at oral argument. Finally, Salvage failed to articulate to the trial court what, if any, admissible testimony he would be able to obtain if a continuance were granted. Thus, summary judgment was appropriate and the trial court did not abuse its discretion in ruling so.

1. *Summary Judgment Standard*

Summary Judgment is proper if the evidence, viewed in a light most favorable to the nonmoving party, shows there is no genuine issue of

material fact, and the moving party is entitled to judgment as a matter of law. Wash. R. Civ. Pro. 56(c). An issue of material fact is one upon which the outcome of the litigation depends. Atherton Condo Ass'n v. Blume Dev., 115 Wn.2d 506, 516, 799 P.2d 250 (1990). Where the defendant is the moving party and has shown the absence of material fact, the plaintiff must come forward with competent evidence showing the existence of a genuine issue of material fact for trial. Young v. Key Pharms., Inc., 112 Wn.2d 216, 225, 770 P.2d 182 (1989) *overruled on other grounds by* Young v. Key Pharms., Inc., 130 Wn.2d 160, 922 P.2d 59 (1996).

To prevail on a motion for summary judgment, a defendant need only show an absence of evidence supporting an element essential to the plaintiff's claim. *See, e.g.,* Las v. Yellow Front Stores, Inc., 66 Wn. App. 196, 198, 831 P.2d 744 (1992); Young v. Key Pharms., Inc., 112 Wn.2d at 225 (citation omitted). All evidence submitted by the parties to a motion for summary judgment must be "admissible in evidence." The plaintiff, in responding to this motion for summary judgment, is prohibited from relying on "allegations, conjecture, or speculation to create an issue of material fact." CR 56(e); Sortland v. Sandwick, 63 Wn.2d 207, 211, 386 P.2d 130 (1963); Preston v. Duncan, 55 Wn.2d 678, 349 P.2d 605 (1960); Geppert v. State, 31 Wn. App. 33, 38, 639 P.2d 751 (1982).

2. The issue of a continuance is moot as Salvage did not request a continuance on the issue of "standard of care" and on that basis alone the trial court was correct in determining that summary judgment was appropriate.

Before the issue of a continuance under CR 56(f) is addressed, the simple fact is that Salvage stated that he did not request a continuance on the issue of standard of care. Therefore, any assignment of error that the trial court abused its discretion in failing to grant a continuance is moot as Salvage failed to present a prima facie case showing a violation of the standard of care.

a. Washington law requires that the plaintiff make a prima facie case of medical malpractice by presenting competent medical testimony regarding duty (standard of care), breach, causation, and damages.

An order granting summary judgment is reviewed de novo. Velt v. Burlington N. Santa Fe Corp., 171 Wn.2d 88, 98, 249 P.3d 607(2011). In Washington, the burden of proof placed upon a plaintiff commencing a medical malpractice action is well established. To defeat a motion for summary judgment presented by a defendant healthcare provider, the plaintiff must present a prima facie case of medical malpractice. The requirements for this are somewhat rigid. To make a prima facie case for medical negligence, a plaintiff must present competent expert testimony of "duty, breach, causation, and damages." Colwell v. Holy Family Hosp., 104 Wn. App. 606, 611, 15 P.3d 210, 213 (2001). See also Pedroza v.

Bryant, 101 Wn.2d 226, 228, 677 P.2d 166 (1984) (citing Hansen v. Wash. Natural Gas Co., 95 Wn2d 773, 776, 632 P.2d 504 (1981)(same). "Evidence is sufficient if it supports a 'reasonable inference' of all the elements." Van Hook v. Anderson, 64 Wn. App. 353, 358, 824 P.2d 509 (1992). "A 'reasonable inference' is found on expert medical testimony rising to the level of reasonable medial certainty." McLaughlin v. Cooke, 112 Wn.2d 829, 836-37, 774 P.2d 1171 (1989).

The burden of proof placed upon plaintiffs is more fully explained in RCW 7.70. RCW 7.70.040, provides that:

> The following shall be necessary elements of proof that injury resulted from the failure of the health care provider to follow the excepted standard of care: (1) the *healthcare provider failed to exercise that degree of care, skill, and learning expected of a reasonably prudent health care provider* at that time in the profession or class to which he or she belongs, in the state of Washington, acting in the same or similar circumstances; (2) such *failure was a proximate cause of the injury complained of.*

RCW. 7.70.040 (emphasis added).

Expert testimony is required to establish a violation of the standard of care and proximate cause. Young v. Key Pharmaceutical, 112 Wn.2d 216, 770 P.2d 182 (1989); Davies v. Holy Family Hospital, 143 Wn.App. 1012, 183 P.3d 283 (2008); McLaughlin v Cooke, 112 Wn.2d at 829. Thus, in medical negligence cases, a plaintiff must produce competent medical expert testimony that establishes that the injury was the

proximately caused by a failure to comply with the applicable standard of care. Seybold v. Neu, 105 Wn. App 676, 19 P.3d 1068 (2001).[5] Expert testimony must be based upon facts in the case, not upon speculation or conjecture. See Young v. Key Pharmaceuticals, 112 WN.2d 216, 216, 770 P.2d 182 (1989). Expert testimony must be sufficient to establish that the injury-producing situation probably or more likely than not caused the subsequent condition, rather than the accident or injury might have, could have, or possible did cause the subsequent condition. Merriman v. Toothaker, 9 Wn.App. 810, 814, 515 P.2d 509 (1973). The standard for expert testimony is high; it must be based on a reasonable degree of medical certainty. McLaughlin, 112 Wn.2d at 836. "If the plaintiff in a medical negligence suit lacks competent expert testimony, the defendant is entitled to summary judgment. Morinaga v. Vue, 85 Wn.App 822, 831-

---

[5] The Washington Supreme Court emphasized this rule of law in the case Harris v. Groth, 99 Wn.2d 438, 663, P.2d 1113 (1983). In Harris, the court ruled that:

> In general, expert testimony is required when an essential element in a case is best established by an opinion which is beyond the expertise of layman... Medical facts in particular must be proven by expert testimony unless they are observable by (a lay person's) senses and describable without medical training... This expert testimony will generally be necessary to establish the standard of care and most aspects of causation.

Id. at 449, (citations omitted)

The court further concluded "[a[bsent exceptional circumstances.... Expert testimony will be necessary to show whether or not a particular practice is reasonably prudent. It will also be necessary to prove causation." Id. at 451.

32, 935 P.2d 637 (1997). *See also* Rounds v. Nellcor Puritan Bennett, Inc., 147 Wn. App. 155, 194, P.3d 274 (2008). In order to establish a breach of the standard of care by a pharmacist, only another pharmacist familiar with the standard of care in the state can provide testimony. McKee v. American Home Products, Corp., 113 Wn.2d 701, 707, 782 P.2d 1045 (1989) (out of state physician could not provide testimony concerning the standard of care for a pharmacist).

Young v. Key Pharmaceuticals, 112 Wn.2d 216, 770 P.2d 182 (1989) is a case which provides valuable guidance in this case. In Young, the Supreme Court of Washington addressed whether the plaintiff, in response to defendant's summary judgment motion, had produced competent evidence of malpractice to raise an issue of material fact, thus precluding summary judgment. The court held that because the plaintiff had failed to produce any competent expert testimony, summary judgment was appropriate. Id. The court emphasized that:

> [i]n this case, although not required to, the medical defendants supported their motion with affidavits. These affidavits are unanimous that (the plaintiff) received proper treatment while in the medical defendants' care. Defendants' assertions that plaintiff lacks competent evidence to support prima facie medical malpractice are correct. *Because plaintiff has not presented competent evidence to rebut the defendants' initial showing of the absence of a material*

issue of fact, the medical defendants are entitled to summary judgment.

Id. at 226-27 (emphasis added). *See also*, White v. Kent Medical Center, 61 Wn.App. 163, 810 P.2d 4 (1991); Pelton v. Tri-State Memorial Hospital, 66 Wn. App. 35, 831 P.2d 1147 (1992); Van Hook v. Anderson, 64 Wn. App. 353, 824 P.2d 509 (1992).

Because the burden of proof is placed upon a plaintiff in a medical malpractice case, the defendant is entitled to summary judgment in its favor even if the defendant submits no affidavit to support its summary judgment. The logic of the rule is that a plaintiff must have expert testimony at the inception of its case in order to present a prima facie case of a violation of the standard of care. Guiile v. Ballard Community Hosp., 70 Wn. App. 18, 25, 851 P.2d 689 (1993)("a defendant moving for summary judgment can meet its initial burden by showing that the plaintiff lacks competent expert testimony.... The burden shifts to the plaintiff to produce an affidavit from a qualified expert witness...." ; Davies v. Holy Family Hospital, 143 Wn.App. 1012, 183 P.3d 283 (2008).

b. In this case, Salvage did not request a continuance on the issue of standard of care and he did not present any evidence to the trial court to make a prima facie showing of medical malpractice thus making summary judgment in favor of Geiger appropriate.

In his Issues Pertaining to Assignment of Error, Salvage states that the trial court failed to grant a two week extension on the issue of "standard of care and/or causation." Opening Brief at 4. However, the record is absolutely clear and unequivocal that Salvage did *not* request a continuance on the issue of standard of care. Salvage in his response to motion for summary judgment makes absolutely clear that he is only seeking a two week continuance to obtain an expert on the issue of causation of the injuries. CP at 97, 98, 98-99, 100, and 101. Further, at oral argument Salvage reiterated his position that an expert was not needed to address the issue of standard of care. RP at 16: 6-8, 18-23.[6]

Salvage argues that no expert is needed for the standard of care as the malpractice was apparent on its face (this argument will be more fully addressed below). However, Salvage has no factual basis supported by the record to show that there was *any* malpractice. He has presented no facts to the trial court so as to defeat summary judgment.[7] Salvage

---

[6] As will be addressed below, Salvage also clearly and unequivocally put on the record at the outset of oral argument that he was not requesting a continuance on the motion for summary judgment, just the motion to dismiss for discovery violations.

[7] Salvage argues in his Opening Brief that counsel for Geiger undermined his own argument through his declaration stating that Salvage had produced some discovery related to the supposed prescription bottles and medical records. Opening Brief at 12-13. However, none of that discovery material was put into declaration form and presented to the trial court for consideration of the summary judgment motion. Salvage confuses turning over discovery and presenting competent and admissible evidence at a summary judgment motion. Thus, counsel for Geiger was correct in his assertion that there was no evidence before the trial court on the summary judgment issue. In addition, although the interrogatory responses are cited in counsel's declaration, there is no declaration attesting

presents no declarations from himself, any of his physicians, or anyone else concerning the underlying "facts" he alleges constitute medical malpractice. Since there are no facts, Salvage cannot argue that the malpractice was apparent on its face. Therefore, any argument that a continuance should have been granted is moot, as there was no request for a continuance on this issue and Salvage failed to meet his burden of proof with regard to one of the four elements of negligence that is required to allow this lawsuit to continue.

3. *The trial court did not abuse its discretion in denying a continuance under CR 56(f) as Salvage presented Continuance of Motion for Summary Judgment.*

CR 56(f) provides:

> (f) When Affidavits Are Unavailable. Should it appear from the affidavits of a party opposing the motion that he cannot, for reasons stated, present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

A court can refuse to continue a proceeding under CR 56(f) for a number of reasons: "(1) the requesting party does not offer a good reason for the delay in obtaining the desired evidence; (2) the requesting party does not state what evidence would be established through the additional

---

to the veracity of content of those answers. As noted, Salvage failed to sign the certification page of those responses. CP at 94.

discovery; or (3) the desired evidence will not raise a genuine issue of material fact." Turner v. Kohler, 54 Wn.App. 688, 693, 775 P.2d 474 (1989). Only one of the qualifying grounds is needed for denial. Pelton v. Tri-State Mem'l Hosp., 66 Wn.App. 350, 356, 831 P.2d 1147 (1992). "The ruling on motions for a continuance and for reconsideration is within the discretion of the trial court and is reversible by an appellate court only for a manifest abuse of discretion." Coggle v. Snow, 56 Wn.App. 499, 504, 784 P.2d 554, 557 (1990).

First and foremost, at oral argument, Salvage explicitly stated on the record that he was not requesting a continuance regarding the motion for summary judgment. See colloquy between Salvage and trail court at RP at 7-8.[8] Thus, it is Geiger's position that by agreeing to proceed with arguing the summary judgment after being specifically asked on the record if he was still seeking a continuance, Salvage has waived any right to preserve this issue for appeal. It was only later when it became clear that trial court is going to rule against him that Salvage changed his position and requested a continuance. However, if this Court determines that this was not a waiver and that the issue is preserved for appeal, Salvage still cannot show that the trial court abused its discretion as outlined below.

[8] Note that on page 5 of the Transcript, Salvage does indicate that he was seeking a continuance of the summary judgment motion but it is clear from the discussion with the trial court that followed that he was referencing a continuance for the motion to dismiss for discovery violations, not the summary judgment motion.

a. Salvage offers no good reason for the requested delay in obtaining the desired evidence.

In the present case, Salvage presented no valid reason why he was unable to obtain the needed affidavit and that a continuance was warranted. First and foremost, Salvage stated to counsel for Geiger that he had in his possession, prior to May 15, 2012, a statement from Dr. Kramp indicating that the alleged provision of the wrong milligram of methadone was the cause of Salvage's 2007 accident. See CP at 141. Furthermore, Salvage listed Dr. Kramp as an expert witness in his response to Interrogatory No. 60. CP at 48. There is no explanation in the record why this statement was not presented to the trial court for purposes of the summary judgment *since he already had it in his possession and he was listed as an expert witness.*

Second, Salvage stated that he had the medical records in question in his possession since May 30, 2012.[9] CP at 163. The motion for

[9] Note that earlier Salvage had told counsel for Geiger that he had the medical records in his possession prior to May 15, 2012. CP at 141. What is concerning about this "mistake" about the date is that Salvage continues to provide one different excuse or version of events after another. On August 7, 2012, Salvage told counsel for Geiger that he had the documents in his possession prior to May 15, 2012, but he did not turn them over (despite knowing of the trial court's discovery order) because he was told by Steve Abel that an adjuster from Safeco would come to his house to retrieve the documents. CP 141. He then said that he never turned them over after talking to Melinda Wieder because Ms. Wieder told him that there was going to be a deposition. CP at 141. Then he submits an affidavit from David Gehrke stating that Gehrke had the pill bottles in question until August 6, 2012. CP at 165. He also stated that Ms. Cook had all of the medical records in her possession on May 30, 2013. RP at 10: 15-16 and 21: 17-20 If that is the case, Salvage outright misrepresented to counsel for Geiger where those pill bottles and medical records were by saying that he had them since prior to May 15, 2012,

summary judgment was not filed until July 2, 2012. Again, there was plenty of time for Salvage to get a declaration from one of his physicians or expert witnesses.

Third, this incident occurred on March 16, 2007. CP at 4. The complaint was not filed until February 26, 2010. CP at 3. The motion for summary judgment was not filed until July 2, 2012. CP at 11. Thus, over five years had elapsed since the complained of accident and almost two and a half years since the filing of the complaint and the filing of the summary judgment. RCW 7.70.040 provides what the statutory requirements are to prevail on a medical malpractice case. Furthermore, case law is very clear that expert testimony is needed to prevail in a case. Thus, Salvage (*pro se* or not) was presumed to know the requirement before filing and continuing with this lawsuit. [10] It should not have come as a shock to Salvage that an expert witness was needed. He had over two years to obtain an expert, yet for whatever reason, he did not. He relied on the fact that there was no discovery order or that no depositions had been requested (CP at 102), however, that discovery has no bearing on his

---

and compounded that misrepresentation by making up stories about his conversations with two different lawyers (one of whom, Ms. Wieder, submitted a declaration categorically denying that she told Salvage not to turn over requested discovery. See CP at 153-154).

[10] A *pro se* litigant is generally held to the same standard as an attorney. Batten v. Abrams, 28 Wn.App. 737, 739 n.1, 626 P.2d 984, review denied, 95 Wn.2d 1033 (1981).

requirement to support his case with expert medical testimony as it relates to standard of care and causation.

Finally, Salvage wrote in his response to the summary judgment motion and in his declaration dated July 30, 2012, that "the affidavit will be ready within two weeks." CP at 103. The actual summary judgment motion was not heard until August 17, 2012. Thus, Salvage based on his own declaration to the trial court, was supposed to have had that declaration by the time of the actual hearing. At oral argument Salvage shifted his argument to state that he did not have an appointment with a doctor until August 30, 2012. RP at 18: 10-17. He offers no explanation other than he did not have an appointment until August 30, 2012.[11] Thus, had a de facto continuance for the two week period requested on July 30, 2012, but still was not able to produce any declarations for the summary judgment. Any further continuance based on this history is not warranted. The trial court did not abuse its discretion.

b. Salvage failed to address what evidence would be established through the additional delay and fails to establish how this will show a genuine issue of material fact.

Salvage failed to articulate what evidence he obtain if a delay is granted. In his declaration dated July 30, 2012, Salvage writes:

[11] Which then begs the question of why he represented to the trial court that he would have the declaration within two weeks if he knew that he did not have an appointment until the end of the month? Again, Salvage offers no explanation.

> After receiving the Defendant's motion for summary judgment, I have been in contact with medical providers who have treated me to obtain an affidavit in response to the motion. Recently, my provider at the Peninsula Pain Clinic has agreed to write the affidavit.

CP at 102-103. That is his sole explanation in his declaration as to why he is requesting the continuance. That does not address what additional evidence would be established and it fails to address whether that will produce a genuine issue of material fact. In his response to the motion for summary judgment, Salvage did make the conclusory statement that the declarations will link the negligence to the injuries, but said nothing more than that. That representation to the trial court was not sufficient to justify a continuance. The trial court did not abuse its discretion.

> c. Geiger would be prejudiced by a continuance of this matter as this matter has been going on for over two and a half years, Geiger continues to incur costs associated with defending this lawsuit and in dealing with the dilatory manner in which Salvage has conducted this case.

Salvage argues in his brief that there is no prejudice to Geiger by granting a continuance for this motion. However, Salvage's dilatory tactics (as evidenced by his declaration stating that he needs two weeks and then when he produces nothing within that requested two week period asks for another two weeks), his non-compliance with court orders and discovery rules (as evidenced by one motion to compel discovery for which the subsequent court order was outright violated that necessitated a

motion to dismiss for discovery violations), his misrepresentations to counsel about discovery matters, and his failure to have the most basic and necessary experts and evidence ready to continue his case causes an undue and unfair burden on Geiger. Salvage alleges that Geiger committed malpractice that resulted in injury. Geiger has every right to have this matter resolved regarding his professional reputation. Salvage had over two years to get his case together, yet did absolutely nothing. "Justice delayed is justice denied." Furthermore, there is no guarantee that Salvage will even have the necessary experts ready if this Court determines that the denial of the continuance was in error. After all, the trial court specifically alerted Salvage that he could request reconsideration if he was able to obtain the necessary declarations in time. RP at 25. Salvage was supposed to have had that examination at the Peninsula Pain Clinic on August 30, 2012, at which time he would have had a declaration from his pain management specialist. This was well within the 30 day period whereby he could request reconsideration under CR 59. However, again, Salvage has done nothing. Thus, if this Court were to remand back to the trial court for further proceedings, Geiger would continue to incur the costs associated with defending this lawsuit and forcing Salvage to comply with the rules. Salvage's history suggests nothing otherwise.

B. Assuming *arguendo* that there is enough evidence in the record regarding the standard of care in order for the case to proceed, Salvage's argument that the malpractice is apparent to a layperson is not supported by case law or the "facts" of this case.

Putting aside the fact that there is nothing in the record that shows that Salvage had a prescription for 5 mg vs. 10 mg of methadone and that the prescription was wrongly filled, Salvage still cannot prevail on the issue that that the malpractice is apparent to a layman. To address this argument, Geiger will assume that there are indeed some facts in the record to argue.

Salvage relies on the case of Harris v Groth, 99 Wn.2d 438 (1983) to support his position that the negligence in this case is apparent on its face. He then compares several out of state cases which reference negligence in filling a prescription for the wrong drug. However, in this case, there is no allegation that the wrong drug was used, it was simply given in the wrong dosage (5 mg v. 10 mg). The Harris case dealt specifically with the need for an expert witness as opposed to a lay witness. The Harris court held that a lay person could testify when the facts are "observable by [a layperson's] senses and describable without medical training." Harris at 449 quoting Bennett v. Department of Labor and Indus., 95 Wn.2d 531, 533, 627 P.2d 104 (1981). That case stands for a slightly different proposition than what Salvage alleges. In Harris there

were witnesses, just not medical providers. That is different than this case where there are no witnesses, expert or lay.

However, there are cases in Washington where the courts have used a res ipsa loquitur analysis in evaluating the need for medical experts in medical malpractice cases. In Ripley v. Lanzer, 152 Wn.App. 296, 215 P.3d 1020, the court recognized that Washington law will apply a res ipsa loquitur analysis where a medical provider leaves a foreign body inside a patient (in this case a scalpel blade that had detached from the handle). The court found that there was no possible reason for a detached scalpel blade to be left embedded in someone's knee. Thus, under a res ipsa loquitur analysis, no expert on that standard of care was needed.

However, that is not the case here. There is nothing in the record to substantiate that a prescription for an amount over what was allegedly prescribed was improper. In fact, prescriptions are often filled with amounts over what is prescribed with instructions to cut a pill in half, etc. This is a radically different case than prescribing the wrong medication or leaving a scalpel inside a patient.

Furthermore, in his answer to Interrogatory No. 52[12] (CP at 44-45), Salvage explains that Geiger was negligent for (1) prescribing the wrong dosage, (2) Defendants never consulted Salvage on the "use of this

[12] Interrogatory No 52 reads as follows: State all facts upon which you based your allegation that the defendant is liable for your alleged damages and injuries." CP at 84.

medication taste (sic)," and (3) not putting the proper "mandatory Federal warning stickers" that the medicine may cause drowsiness. This adds a whole new complexity to this case. While Geiger is unsure what the second issue regarding the taste of the medicine is, the negligence in failing to provide the proper Federal mandatory warning stickers is certainly an issue that the average lay person would not know. That would take an expert who is familiar with the standard of care for the warning stickers to testify.

C. The trial court did not ere in finding that the notice of hearing (presumably for the August 17, 2012, hearing) was served on the parties as required by CR 7 and CR 56.

First and foremost, there is nothing in the record to indicate that the notice of hearing was improperly served or that proper notice was not given to Salvage. The record reflects (as does page 4 of 6 of the docket printout attached to Salvage's Opening Brief) that the summary judgment motion was noted for August 17, 2012. CP at 156-157. It was noted on August 10, 2012. It is in compliance with CR 56 in that the hearing was held more than 28 days after the motion for summary judgment was filed (July 2, 2012 to August 17, 2012).

Salvage also argues that the reply to his response and supplemental declaration of counsel somehow resets the 28-day notice requirement of

CR 56. However, Salvage ignores the fact that CR 56 specifically allows the moving party to file a reply to the other party's response. CR 56(c) provides: "[t]he moving party may file and serve rebuttal documents no later than 5 calendar days before the hearing." The record is clear that on August 3, 2012, Geiger filed his reply and submitted the supplemental declaration from counsel addressing the issues raised by Salvage in his response. The actual hearing for the summary judgment was then heard two weeks later. Thus, proper notice was provided under all court rules and this assignment of error is without merit.

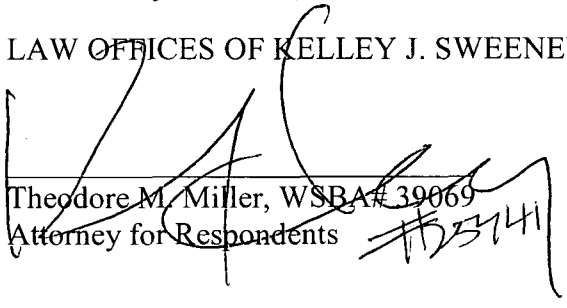
IV. CONCLUSION

The trial court was correct in dismissing this case in summary judgment. First, Salvage failed to come forward with sufficient and competent evidence to make a prima facie showing of a violation of the standard of care and any evidence concerning causation. Second, Salvage did not meet the requirements of CR 56(f) for a continuance. The trial court did not abuse its discretion in denying that request. Further, Geiger would suffer substantial prejudice by incurring further costs associated with litigation this case beyond that which would normally be expected given Salvage's history of noncompliance with court orders, failure to follow court rules, misrepresentations to counsel and the court, and overall dilatory tactics in prosecuting his case. Third, even if there is enough

evidence in the record, this is not a case where the standard of care is so obvious on its face that an expert is not needed. Thus, the trial court was correct in finding that Salvage had failed to come forward with any evidence to allow his case to survive summary judgment. The trial court should be affirmed on all grounds.

DATED this 8th day of March, 2012.

LAW OFFICES OF KELLEY J. SWEENEY



Theodore M. Miller, WSBA# 39069
Attorney for Respondents

PROOF OF SERVICE
NO. 43954-9-II

I hereby certify that on March 8, 2013, I sent for filing the original

Respondent's Brief and one copy, addressed to the following:

Court of Appeals, Division II
State of Washington
950 Broadway, Suite 300
Tacoma, WA 98402

I further certify, that on March 8, 2013, I sent a true and correct copy of

the ***Respondent's Brief,*** via ABC Legal Messengers, addressed to the following:

Joseph O. Baker
Law Offices of Joseph O. Baker
19550 International Blvd., Suite 312
SeaTac, WA 98188

DATED this 8th day of March, 2013 at Seattle, WA.

Nina Cordova
Legal Assistant to Theodore Miller